Supreme Court, U.S.
FILED
091264 FEB 12 2010
OFFICE OF THE CLERK

156 (1)

No. 09-

In The
SUPREME COURT OF THE UNITED STATES

Paul Joseph McNeil, (Agency No.018-694-969)
Petitioner,

vs.

Eric Holder, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

By: Sandra Greene, Esquire
GreeneFitzgerald Advocates and Consultants
2001 East Market Street, 2nd Floor
York, Pennsylvania 17402
(717) 755-8188
Attorney For Petitioner
Paul Joseph McNeil

QUESTION PRESENTED

The United States Court of Appeals for the 3rd Circuit has asserted that, pursuant to the *Real ID Act*, Pub. L. No. 109-13, 119 Stat. 231 (2005), where an alien asserts constitutional issues and questions of law, it maintains jurisdiction to adjudicate the alien's petition for review, notwithstanding the fact that the agency adjudicated the aliens' discretionary relief application in proceedings before the immigration court. Where, however, the alien's challenge to the adverse agency action relates to an assertion that the agency violated the alien's right to due process in completing the adjudication of the application, the Court of Appeals has no jurisdiction to consider the alien's constitutional claim because such claims touch upon matters related to the agency discretion.

There is a conflict among the circuits as to the parameters of 8 USC section 1252(a)(2)(B)(i). The question in dispute is, does this law apply to challenges of agency determinations regarding ***any judgement*** related to judicial review of agency determinations regarding 240A relief, cancellation of removal for lawful permanent residents? There appear to be three points of view on this issue: first, that 8 USC section 1252(a)(2)(B)(i) precludes all review of any alien legal challenge in proceedings where the agency has made a discretionary determination; second, that 8 USC section 1252(a)(2)(B)(i) does not preclude review of constitutional claims or questions of law, only discretionary determinations of the agency; third that 8 USC section 1252(a)(2)(B)(i) does not preclude review of constitutional claims or questions of law

so long as those claims are wholly unrelated to the agency's discretionary determination. It appears that the US Court of Appeals for the Third Circuit has adopted the third point of view as outlined above.

The question presented is:

I. Whether the Court of Appeals erred in asserting that though it had jurisdiction to adjudicate the Petitioner's petition for review because he presented constitutional challenges to the agency's adverse legal determination, it had no jurisdiction to adjudicate constitutional challenges to the manner in which the agency completed its discretionary determination, notwithstanding the fact that the agency's adverse discretionary determination was based on a clear and undisputed misapprehension of the factual record, Petitioner had no other avenue through which to challenge the agency's misapprehension of fact, and Congress did not clearly preclude review of constitutional challenges to plain agency error in the agency's discretionary determinations?

CORPORATE DISCLOSURE STATEMENT

Paul Joseph McNeil is an individual and has no corporate involvement relevant to these proceedings.

TABLE OF CONTENTS

Page

Question Presented ..... i-ii
Corporate Disclosure Statement iii
Table of Contents iv
Table of Authorities ..... iv-vi
Opinions Below 1
Jurisdiction 1
Statutory Provisions Involved 1-2
Parties To The Proceedings 2-3
Statement Of The Case 3-7
1. Federal Appellate background 3-4
2. Background In Administrative Proceedings 4-7
Reasons for granting the Petition 7-12
Conclusion 13-14
Appendices ..... A 1- A21

TABLE OF AUTHORITIES

STATUTES-

The Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231(2005) ..... i, 10, 12, 13
Immigration and Nationality Act, 8 USC section 1227(a)(2)(A)(iii)[also cited as INA section 237(a)(2)(A)(iii)] 5
Immigration and Nationality Act, 8 USC section 1227(a)(2)(B)(i)[also cited as INA section 237(a)(2)(B)(i)] 5, 6
Immigration and Nationality Act, 8 USC section 1227(a)(2)(C)[also cited as INA section 237(a)(2)(C)] 5, 6
Immigration and Nationality Act , 8 USC section 1229b 1-2

Page

Immigration and Nationality Act, 8 USC section 1252(a)(2)(B)(i) ..... i, 2, 8-11, 13
28 USC section 1254(1) 1

STATE STATUTES-

New York Penal Law Section 110 5
New York Penal Law Section 220.06 5
New York Penal Law Section 220.03 5
New York Penal Law Section 221.40 5
New York Penal Law Section 265.02 5

REGULATIONS-

8 Code Of Federal Regulations Section 1003.1(d)(3)(i),(iv) 3

CASES-

Gonzales-Oropeza v. US Attorney General, 321 F.3d 1331 (11th Cir. 2003) 8
Iddir v. INS, 301 F.3d 492 (7th Cir. 2002) 9
INS v. St. Cyr, 533 US 289 (2001) 11
Jean v. Gonzales, 435 F.3d 475 (4th Cir. 2006) 8
Matter of Marin, 16 I & N Dec. 581 (BIA 1978) 12
Mendez-Moranchel v. Ashcroft, 338 D.3d 176 (3rd Cir. 2003) 8, 9
Mireles-Valdez v. Ashcroft, 393 F.3d 699 (6th Cir. 2005) 8, 11
Morales-Morales v. Ashcroft, 384 F.3d 418 (7th Cir. 2004) 8
Montero-Martinez v. Ashcroft, 277 F.3d 1137 (9th Cir. 2002) 8, 11

Page
Najjar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001) 11
Ortiz -Cornejo v. Gonzales, 400 F.3d 610 (8th Cir. 2005) 8
Reyes-Vasquez v. Ashcroft, 395 F.3d 903 (8th Cir. 2005) 11
Santana Albarran v. Ashcroft, 393 F.3d 699 (6th Cir. 2005) 8, 11
Schroeck v. Gonzales, 429 F.3d 947 (10th Cir. 2005) 8
Sepulveda v. Gonzales, 407 F.3d 59 (2nd Cir. 2005) 8, 10, 11
Singh v. Gonzales, 413 156 (1st Cir. 2005) 8

OTHER SOURCES-

Federal Court Jurisdiction Over Discretionary Decisions After Real ID: Mandamus, Other Affirmative Suits and Petitions for Review, Mary Kenney, *American Immigration Law Foundation*, April 5, 2006 8

TABLE OF APPENDICES-

Appendix A - November 9, 2009 Decision of the US Court Of Appeals For the Third Circuit, Petition For Rehearing ..... (A-1 - A-2)
Appendix B - December 11, 2007 Decision of the US Court Of Appeals for the Third Circuit, .. (A-3 - A-6)
Appendix C- March 8, 2008 Decision of the Board Of Immigration Appeals, ... (A-7 - A- 10)
Appendix D- July 31, 2007, Decision of the Immigration Judge ..... (A-17 - A-22)

OPINIONS BELOW

The order of the Court of Appeals below on Petitioner's petition for rehearing, dated November 9, 2009 is unreported, as was the original order, dated September 9, 2009, both are reprinted at Appendices A and B, respectively. The decision of the Board of Immigration Appeals, dated March 8, 2008 is reprinted at Appendix C. The decision of the Immigration Judge, dated July 31, 2007, is reprinted at Appendix D.

JURISDICTION

The decision of the Circuit Court on Petitioner's Petition for Rehearing was entered on November 9, 2009. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

STATUTORY PROVISIONS INVOLVED

8 USC section 1229b
(a) Cancellation of Removal for Certain Permanent Residents-

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-
>
> > (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> > (2) resided in the United Sates continuously for 7 years after having been admitted in any status, and
> > (3) has not been convicted of any aggravated felony.

8 USC section 1252(a)(2)
(2) Matters Not Subject to Judicial Review

(B) Denials of Discretionary Relief- Notwithstanding any other provision of law (keep), including section 2241 of title 28 United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and ***except as provided in subparagraph (D)***, and regardless of whether the judgement, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-

(i) any judgment regarding the granting or relief under section 212(h), 212(I), 240A, 240B, or 245...

(D) Judicial Review of Certain Legal Claims- Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section. (emphasis added)

PARTIES TO THE PROCEEDINGS

Petitioner is Paul Joseph McNeil, a native and citizen of Jamaica. Patitioner was granted cancellation of removal in proceedings before the immigration judge, but that determination was vacated by the Board of Immigration Appeals. The US Court of Appeals for the Third Circuit, sustained the determination of the Board of Immigration Appeal and denied the Petitioner's petition for review.
The Respondent is Eric Holder, the Attorney General

of the United States.

STATEMENT OF THE CASE

1. Federal Appellate Background-

The US Court of Appeals for the Third Circuit denied the Petitioner's petition for rehearing as well as his underlying petition for review upon its determination that, although it had jurisdiction to adjudicate Petitioner's petition for review due to the Petitioner's assertion of constitutional error on the part of the agency, it, ultimately, had no jurisdiction to adjudicate the Petitioner's constitutional claims because those claims were related to the agency's exercise of its discretionary authority. For this reason, the Court of Appeals determined that the Petitioner failed to establish that the Board erred as a matter of law.

Petitioner's original petition for review asserted that the Board of Immigration Appeals erred as a matter of law by disregarding the factual determinations of the immigration judge, as independent fact finding by the Board was improper, pursuant to 8 CFR section 1003.1(d)(3)(i),(iv), absent a determination that the immigration judge committed plain error. Additionally, the Petitioner asserted that the Board's error in that regard violated his right to due process in the removal proceedings.

In a decision rendered on or about September 9, 2009, the Court of Appeals determined that although the Petitioner's constitutional and legal challenges

permitted adjudication of his appeal, the court was without jurisdiction to consider the legal merits of the challenges because they touched upon the agency's exercise of discretion. Accordingly, the Court of Appeals denied Petitioner's petition for review. The Petitioner sought rehearing of the adverse determination of the Court of Appeals. On or about November 9, 2009, the Petitioner's request for rehearing was denied.

2. Background In Administrative Proceedings -

The Petitioner is Paul Joseph McNeil, a native and citizen of Jamaica. The Petitioner is married to Linda McNeil, a citizen of the United States. Petitioner was admitted to the United States as a lawful permanent resident on or about February 17, 1970 through New York, NY. The Petitioner has substantial family ties to the United States beyond his wife. He is the father of three US citizen children, one of whom is a minor with substantial emotional and behavioral problems. Prior to his detention, the Petitioner was the court designated custodial parent to his minor child. Additionally, the Petitioner's elderly mother and grandmother are citizens of the United States. Further, the Petitioner has a sister who also resides in the United States.

The Petitioner was placed into removal proceedings following an encounter with law enforcement as the result of an arrest on or about March 26, 2007, for possession of a controlled substance and reckless endangerment. Petitioner was placed into removal proceedings through issuance of form I-831, the notice to appear, dated March 21,

2007. The Respondent alleged that the Petitioner was convicted of two crimes that subjected him to removal. First, that he was convicted, on or about February 8, 1985, pursuant to NY penal law section 220.06, for possession of cocaine. Second, the agency asserted that the Petitioner was convicted on or about the same date for possession of a weapon in the third degree, pursuant to NY penal law section 110/265.02. For these offenses, the Respondent asserted that the Petitioner was subject to removal pursuant to 8 USC section 1227(a)(2)(B)(i) and 8 USC section 1227(a)(2)(C), respectively.

Subsequent to the submission of the notice to appear, the agency asserted further grounds of removal against the Petitioner on form I-261 in which it contended that the Petitioner had additional criminal convictions sufficient to warrant his removal from the United States. Specifically, the agency asserted that the Petitioner had been convicted of criminal sale of marijuana, pursuant to NY penal law section 221.40, on or about October 26, 1981, and criminal possession of a controlled substance in the 7th degree, pursuant to NY penal law section 220.03, on or about March 26, 2007. For the first of these offenses, the agency asserted that the Petitioner was subject to removal pursuant to 8 USC section 1227(a)(2)(iii). For the second of these offenses, the agency relied upon its charge pursuant to 8 USC section 1227(a)(2)(B)(i) that it had lodged under the notice to appear.

In the removal proceedings, the immigration judge sustained the removal related to 8 USC section 1227(a)(2)(B)(i), and 1227(a)(2)(C), but rejected the

aggravated felony charge lodged against the Petitioner. Based on those legal findings, the immigration judge determined that the Petitioner was statutorily eligible to seek cancellation of removal. The Petitioner filed the application contending that his removal from the United States would constitute not only a hardship to himself, but also to his minor child over whom he had sole custody, as well as his elderly mother and grandmother.

During the course of the hearing on the relief application, the Petitioner presented evidence in support of the application, including testimony regarding his drug addiction. The government opposed grant of the application due to its concerns related to the extent of the Petitioner's encounters with law enforcement. The Respondent contended that the Petitioner's negative factors outweighed his equities and requested that the application for cancellation be denied. The immigration judge, notwithstanding the determination that the case was a close call, determined that the Petitioner's equities warranted grant of the application.

The Respondent appealed the decision, and, on or about March 8, 2008, the Board sustained the agency appeal finding that the Petitioner's criminal history "...militate against a favorable exercise of discretion..." This determination was entered over the dissent of one Board member. Additionally, the Board asserted: "...the respondent has spent considerable portions of his time in this country either incarcerated or on probation."

Notwithstanding the contention of the Board in this regard, the agency made no assertions regarding the Petitioner's period of incarceration and probation, but, rather, noted that the Petitioner had been arrested 11 times during his 40 year residence in the United States. The record established that at the time of the hearing before the immigration judge, the Petitioner had been residing in the United States for nearly 40 years, was sentenced to approximately 5 years incarceration, but served substantially less time than that and was subject to probation for approximately that same period of time.

The Petitioner filed a timely appeal of the decision of the Board. The Petitioner presented substantive legal and costitutional challenges to the Board's adverse determination.

The Petitioner's appeal was dismissed on or about September 9, 2009 and his request for rehearing was denied on or about November 9, 2009.

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred in its determination that although the Petitioner's constitutional and legal challenges permitted it to assert jurisdiction over the petition for review, it had no jurisdiction to actually adjudicate the substance of the legal challenges presented by Petitioner because those challenges touched upon matters related to the agency's exercise of discretion. The determination of the Court of Appeals rendered the Petitioner's legal rights a nullity in a manner clearly not anticipated by Congress.

The Courts of Appeals are in conflict as to when the provisions of 8 USC section 1252(a)(2)(B)(i) permit judicial review and when they do not. At least 10 Courts of Appeals have found that where the issue raised on appeal is not one left up to the agency's discretion, judicial review is permitted.[1] The Fourth Circuit has also addressed this issue.[2] This issue was also addressed by the US Court of Appeals for the Third Circuit in [*Mendez-Moranchel v. Ashcroft*], 338 F.3d 176 (3rd Cir. 2003). In that decision, the Court of Appeals stated: "We join the other circuits[3] and conclude that, for nondiscretionary factors, the Court maintains jurisdiction, but as to discretionary

---

[1]See *Singh v. Gonzales*, 413 F.3d 156 (1st Cir. 2005); *Sepulveda v. Gonzales*, 407 F.3d 59 (2nd Cir. 2005); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Santana-Albarran v Ashcroft*, 393 F.3d 699 (6th Cir. 2005); *Morales-Morales v. Ashcroft*, 384 F.3d 418 (7th Cir. 2004); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610 (8th Cir. 2005); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002); *Schroeck v. Gonzales*, 429 F.3d 947 (10th Cir. 2005); *Gonzales-Oropeza v. US Attorney General*, 321 F.3d 1331 (11th Cir.2003).

[2]See, "Federal Court Jurisdiction Over Discretionary Decisions After Real ID: Mandamus, Other Affirmative Suits And Petitions For Review", Mary Kenney, *American Immigration Law Foundation*, April 5, 2006, at page 6, footnote 9. *Jean v. Gonzales*, 435 F.3d 475 (4th Cir. 2006) - review permitted.

[3]The Court referenced the decision of the United States Court of Appeals for the Ninth Circuit in Montero-Martinez v. Ashcroft, 277 F.3d 1137 (9th Cir. 2002) (which permitted review as the agency determination went to statutory eligibility not discretion) and the decision of the US Court of Appeals

(Continued on following page)

decisions, we lack jurisdiction." [4]

What has been left undecided by the (*Mendez-Moranchel v. Ashcroft*) decision is the question whether a legal/constitutional challenge involving an issue formed from facts not related to the agency's exercise of discretion, but considered by the agency in exercising its discretion, is properly designated as one ***within*** the agency's discretion such that Courts of Appeals are forbidden to review it?

In this Petitioner's case, the Court of Appeals refused to consider the Petitioner's challenge to the Board's factual determination that he was not deserving of a favorable exercise of discretion because petitioner had allegedly spent *too much of the time in which he resided in the United States either incarcerated or on probation*. The issue of how much time the Petitioner spent in a state of incarceration or probation was not an issue left up to the discretion of the Board to determine. It was an independently knowable fact. Similarly, the length of the Petitioner's residence in the United States was an independently knowable fact. The factual record established that the Petitioner had been residing in the United States for approximately 40 years at the time the Board's decision was issued and Petitioner had been incarcerated for a total period of less than 4 years and had been subject to probation

---

for the Seventh Circuit in *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002)(finding that 8 USC section 1252(a)(2)(B) only bars jurisdiction of federal courts to review agency determinations that are purely discretionary.

[4]Id at pages 5-6 of 7.

authority for approximately 4 years. Thus, Petitioner had spent less than 10% of his residence in the US subject to incarceration and less than 10% subject to probation. Petitioner challenged the Respondent's assertion that his 4 years incarceration & on probation was "substantial" in the contex of his 40 year residence in the US.

As such, the Court of Appeals erred in failing to consider the Petitioner's challenge to the manner in which the Board evaluated these independently knowable facts (non-discretionary issues), notwithstanding the fact that it had no jurisdiction to review matters Congress left to the sole discretion of the Board. The nothing in the *Real ID Act* related to the authority of the courts to review constitutional and legal challenges to agency action, precluded the Court of Appeals from reviewing the Petitioner's legal/ constitutional challenges simply because they touched upon issues considered by the Board in making its discretionary determination.

Importantly, the Second Circuit in *Sepulveda v. Gonzales*, 407 F.3d 59 in rejecting the government's challenge to its jurisdiction to consider an alien's petition for review, noted :

> The government contends that under section 1252(a)(2)(B), we may not review any order granting or denying section 1229b ... relief, regardless of whether relief was denied as a matter of discretion or because a nondiscretionary factor was found to preclude eligibility for relief. We disagree.

> Mindful of the "strong presumption in favor of judicial review of administrative action", *INS v. St. Cyr*, 533 US 289, 298...(2001) and the 'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien'...we hold that 8 USC section 1252(a)(2)(B) does not strip courts of jurisdiction to review nondiscretionary decisions regarding an alien's eligibility for the relief specified in 8 USC section 1252(a)(2)(B)(i).

At page 4 of 6. In *Sepulveda*, the 2nd Circuit noted that its determination was consistent with decisions rendered in the 8th [*Reyes-Vasquez v. Ashcroft*, 395 F.3d 903 (8th Cir. 2005)]; 6th[*Santana Albarran v. Ashcroft*, 393 F.3d 699 (6th Cir. 2005)]; 5th [*Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003)]; 9th [*Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002)]; 11th [*Najjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001)], Circuits.

The agency made no assertion that the Petitioner's period of incarceration/probation was excessive or, in and of itself, a negative factor weighing against the grant of his application. Rather, the agency's opposition was based largely upon the number of arrests during Petitioner's residence in the US.

Accordingly, the Court of Appeals erred in its determination that it lacked jurisdiction to review the Petitioner's legal challenges that were based upon non-discretionary issues over which Congress

extended no prohibition on judicial review, either under 8 USC section 1252 or the *Real ID Act*. The Court's consideration of the Petitioner's argument that the Board misapprehended matters related to his criminal history in no way infringed upon the Board's ability to make an ultimate determination regarding his eligibility for relief in the removal proceedings. The Board had no discretion to determine, independent of the record, the length of the Petitioner's incarceration, or to mischaracterize these facts the length of his residence in the United States. The fact that it could use this factual information to render a discretionary determination on the cancellation application did not render those independent factual matters "discretionary".

Further, the Petitioner had the right to raise a due process challenge to the agency's misapprehension of facts related to negative factors that could preclude his eligibility for cancellation because those factors are ones the Board was legally obligated to consider when deciding whether to grant the Petitioner's relief application or not. The Board had no discretion over whether to consider those factors in its adjudication or not. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). Accordingly, the Court of Appeals erred in not considering the Petitioner's arguments solely because the Board also relied upon those facts when exercising its discretionary power in adjudicating the cancellation application.

CONCLUSION

The decision rendered by the Court of Appeals for the 3rd Circuit below highlights the disparate manner in which the jurisdictional provisions of 8 USC section 1252(a)(2)(B)(i) and the *Real ID Act* have been interpreted by the various Courts of Appeals, resulting in uneven protection of the due process rights of aliens in removal proceedings. The decision of the 3rd Circuit in this Petitioner's proceedings was clearly erroneous as it failed to adjudicate Petitioner's legal challenges grounded upon non-discretionary issues simply because those issues were considered by the Board when rendering its discretionary determinations, notwithstanding the fact that the Board had no discretionary power to make an independent assessment of the underlying acts/issues in question.

Though the courts tend to agree that there is no jurisdiction to consider alien challenges to discretionary or purely discretionary matters, there is sufficient disagreement and uncertainty as to whether non-discretionary issues considered by the Board in exercising its discretionary power are included within the scope of matters under the discretion of the Board solely for that reason or whether they are always outside of the Board's discretionary scope.

In view of the centrality that the *Real ID Act* and 8 USC section 1252(a)(2)(B)(i) have to the jurisdictional authority of Courts of Appeals to adjudicate alien appeals where the agency has exercised discretionary authority of some sort, the issues raised herein are of

significant importance and should be resolved by this court. Accordingly, this petition for writ of certiorari should be GRANTED.

Sincerely,

SANDRA GREENE,
GreeneFitzgerald Advocates
and Consultants
Attorney Of Record
2001 East Market Street, 2nd Floor
York, Pennsylvania 17402
(717) 755- 8188
(717) 843-0417 fax
Attorney For Petitioner,
Paul Joseph McNeil

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

08-2040

PAUL JOSEPH MCNEIL,
Petitioner,

V.

ATTORNEY GENERAL OF THE
UNITED STATES,
Respondent

PRESENT: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, WEISS*, and GARTH,* CIRCUIT JUDGES

Circuit Judges

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked

for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Weiss
United States Circuit Judge

Dated: November 9, 2009

---

*As to Panel Rehearing Only

DATED: April 22, 2008
DWB/cc:
Sandra L. Greene, Esq.
S. Michael Musa Obregon, Esq.
Jeffrey L. Menkin, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2040

PAUL JOSEPH MCNEIL.
Petitioner

VS

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

On Petition of Review of an Order of the
Board Of Immigration Appeals
(Agency No. A018-694-969)
Immigration Judge: Honorable Walter A. Durling

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 2, 2009
Before: FUENTES, WEIS and GARTH,
Circuit Judges
(Opinion Filed: September 9, 2009)

OPINION

PER CURIAM:

Paul McNeil petitions for review of an order of

the Board of Immigration Appeals ("BIA") vacating the Immigration Judge's ("IJ") order granting his application for cancellation of removal. We will deny the petition for review.

McNeil is a native and citizen of Jamaica, who was admitted to the United States as a lawful permanent resident in 1970 at the age of eleven. In 2007, the Immigration and Naturalization Service ("INS") issued a notice to appear charging that McNeil was subject to removal from the United States based on his conviction sin New York state court in 1985 for a controlled substance offense and a firearms offense. The INS later filed two notices of "Additional Charges Of Inadmissibility/Deportability" against McNeil based on his convictions in New York state court in 1981, 1990 and 2007 for controlled substance offenses. Through counsel, McNeil conceded that he is removable. McNeil applied for cancellation of removal.

McNeil testified that he is married but separated, and that he has three United States citizen children. Two of McNeil's children are adults and the youngest child, Daytwana Derby, is now fourteen years old. McNeil is Daytwana's court-ordered custodial parent and they have a close relationship. McNeil testified that Daytwana is hyperactive and the he has taken her to therapy from time to time. At the time of the hearing, Daytwana was in the care of her 70 year old grandmother and 95 year old great grandmother. McNeil stated that, since he was taken into custody, Daytwana has been doing worse in school and misbehaving. A mental health evaluation of Daytwana

was performed in connection with the immigration proceedings, and the report that Daytwana is suffering from a major depressive condition and symptoms of anxiety as a result of McNeil's detention.

McNeil has 11 convictions for crimes committed from 1980 through 2007. These convictions were all misdemeanors with the exception of a 1990 drug offense. McNeil admitted that he had a marijuana problem, but that he participated in drug rehabilitation courses while incarcerated and that he has been drug free since 1989. He stated that he pleaded guilty to a drug offense in 2007 to avoid pretrial confinement, and that he did not have drugs when he was arrested.

McNeil has worked for the City of New York on a seasonal basis. When he was not working, he received public assistance. McNeil testified that he planned to find a full-time job, care for his daughter and remain law abiding. McNeil stated that, if deported, he would like to take Daytwana with him to Jamaica, but NcNeil's mother, who also testified, felt that McNeil could not take her because he does not know anyone there.

The IJ found this case to be a close one. The IJ stated that McNeil had not been as attentive as one would expect him to be with a child with mental health problems, noting his arrests in 2006 for misdemeanor criminal mischief and disorderly conduct and a misdemeanor conviction for reckless endangerment. The IJ, however, also concluded that McNeil cares deeply for Daytwana and the rest of his family, and that he is not a bad person overall. The IJ noted

that, until 2006, McNeil had gone 18 years without a conviction, and that, when McNeil was working, he was a good and reliable worker. The IJ stated that he would deny McNeil's application for cancellation of removal based on his criminal record absent his daughter. However, in an effort to maintain family unity, and because Daytwana is a pre-teen with exceptional needs living with elderly grandparents, the IJ granted McNeil's application in the exercise of discretion.

The BIA sustained the Government's appeal, denied McNeil's application for cancellation of removal in the exercise of discretion, and ordered McNeil's removal. The BIA agreed with the Government that significant negative factors militated against favorable exercise of discretion. The BIA noted McNeil's 11 convictions, recognizing that most of the convictions involved simple possession of controlled substances, but stating that McNeil had also been convicted of selling marijuana, attempting to possess a weapon, and reckless endangerment. The BIA also noted that a 1990 conviction resulted in a two to four year prison sentence.

The BIA also recognized that McNeil had lived here for nearly 40 years and that he had come here as a child. But the BIA found these facts less compelling because the amount of time McNeil had spent either incarcerated or on probation. The BIA recognized that Daytwana would experience substantial personal hardship if McNeil is removed, but stated that McNeil is not a person of significant value to his community and that he has not been meaningfully rehabilitated.

Weighing the equities against the adverse factors, the BIA concluded that a favorable exercise of discretion was not warranted absent strong evidence that McNeil had no propensity to reoffend. One Board member dissented, noting that she found no error in the IJ's decision. This petition for review followed.

We must first address the Government's motion to dismiss the petition for review. The Government argues that we lack jurisdiction because the BIA denied McNeil's application for cancellation of removal in the exercise of discretion. The Government contends that McNeil raises no colorable questions of law that might bypass the jurisdictional bar, and that 8 CFR section 1003.1(d)(3)(ii) allows the BIA to review questions of discretion de novo. The Government states that McNeil asserts only that the BIA did not properly exercise its discretion in evaluating the evidence.

The Government is correct that "[t]his Court generally lacks jurisdiction to review discretionary decisions made under [8 USC] section 1229b regarding cancellation of removal." Mendez-Reyes v. Attorney General, 428 F.3d 187, 189 (3rd Cir. 2005). Under the Real ID Act, the Court retains jurisdiction to entertain constitutional claims and questions of law. Id McNeil argues in his brief that the BIA erred as a matter of law by failing to defer to the IJ's findings and by engaging in independent fact finding in violation of 8 CFR section 1003.1(d)(3)(i),(iv). McNeil also asserts that these errors denied him due process of law. Because McNeil presents questions within our jurisdiction, the Government's motion to dismiss the petition for review is denied.

Although we have jurisdiction over the petition for review, McNeil has not shown that the BIA erred as a matter of law. The BIA relied on 8 CFR section 1003.1(d)(3)(ii), which allows the BIA to review questions of discretion de novo. The BIA did not disagree with the IJ's factual findings or engage in its own fact finding in violation of the regulations. Rather, the BIA's decision reflects that the BIA determined that a favorable exercise of discretion was not warranted when the equities in McNeil's case were balanced against the negative factors. To the extent McNeil challenges that determination, we lack jurisdiction to consider the BIA's discretionary decision.

McNeil's due process argument stemming from the alleged legal error is also without merit.

Accordingly, we will deny the petition for review.

APPENDIX C A-9

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 220412

File: A018-684-969 York Date: MAR 5, 2008

In re: PAUL JOSEPH MCNEIL a.k.a. Pablo McNeil a.k.a. Paul Delroy

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Juan P. Luciano, Esquire

ON BEHALF OF DHS: Maureen C. Gaffney
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. section 1227(a)(2)(B)(i)]- Convicted Of Controlled Substance Violation

Sec. 237(a)(2)(C), I&N Act [8 USC section 1227(a)(2) (C)]-Convicted Of firearms or destructive device violation

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. section 1227(a)(2)(A)(iii)]- Convicted Of Aggravated Felony

APPLICATION: Cancellation Of Removal

The Department of Homeland Security (the "DHS") appeals from an Immigration Judge's July 31, 2007, decision granting the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 USC section 1229b(a) (2000). The appeal will be sustained, the respondent's application for cancellation of removal will be denied in the exercise of discretion, and the respondent will be ordered removed from the United States.

The respondent, a native and citizen of Jamaica, does not dispute that he is removable from the United States as an alien convicted of a controlled substance violation and a firearms offense. Sections 237(a)(2)(B)(i) and 237(a)(2)(C) of the Act, 8 USC section 1227(a)(2)(B)(i) & (C). Moreover, although the DHS argues on appeal that the respondent is deportable and ineligible for cancellation of removal by virtue of an aggravated felony conviction, under the controlling precedents of the United States Court of Appeals for the Third Circuit, none of the respondent's multifarious drug convictions qualifies as an aggravated felony. *Jeune v. Attorney General of the United States*, 476 F.3d 199, 205 (3rd Cir. 2007); *Wilson v. Ashcroft*, 350 F.3d 377, 382 (3rd Cir. 2003); *Gerbier v. Holmes*, 280 F.3d 297, 315-18 (3d Cir. 2002); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3rd Cir. 2001). These precedents are controlling in removal proceedings arising within the Third Circuit, see *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), and therefore we agree with the Immigration Judge's determination that the

respondent is not statutorily ineligible for cancellation of removal.

Thus, the sole question remaining to be decided on appeal is whether the respondent merits cancellation of removal in the exercise of discretion, a matter which we review de novo. 8 CFR section 1003.1(d)(3)(ii) (2007).

To determine whether the respondent merits cancellation of removal in discretion, we must balance the adverse factors evidencing his undesirablility as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of cancellation of removal appears in the best interests of this country. *Matter of C-V-T-*, 22 I & N Dec. 7 (BIA 1998) (following *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978)). Among the factors deemed adverse to an alien are the nature and underlying circumstances of the removability ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *Id* Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, proof of genuine rehabilitation if a criminal record

exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives. *Id*.

We agree with the DHS that very significant negative factors militate against a favorable exercise of discretion in this instance. The respondent has 11 criminal convictions in New York state, extending over a period of more than 25 years, from 1981 to 2007. Most of these convictions have involved the simple possession of controlled substances, although the respondent has also been convicted of selling marijuana, attempting to possess a weapon and, most recently, reckless endangerment. A number of these convictions resulted in the respondent's incarceration, including a 1990 conviction for felony drug possession for which he was sentenced to from 2 to 4 years in prison. It is not clear whether the respondent has ever participated in drug rehabilitation treatment, either court-ordered or otherwise, but the fact that he is a repeat offender reflects a manifest lack of rehabilitation on his part.

The respondent has also adduced a number of countervailing equities. In particular, the respondent has been a lawful permanent resident of the United States for nearly 40 years , and he came to this country as a child. However, the equitable significance of the respondent's residence in the United States is a less compelling factor than it would otherwise be because the respondent has spent considerable portions of his time in this country either incarcerated or on probation. The respondent has three United States citizen children, two of whom are adults. The respondent's

remaining child is 12 years old and appears to be quite troubled in various respects, and the respondent is her custodial parent, her mother having been deprived of custody by court order. There is no doubt that the respondent's daughter would experience substantial personal hardship in the event of the respondent's removal, since she will either have to return to Jamaica with the respondent or remain in the United States with relatives and thereby fact separation from her father. The respondent's employment history has been uneven, he has never served in the Armed Forces, he appears to have few property or business ties, and his criminal recidivism reflects both that he is not a person of significant value to his community and that he has not been meaningfully rehabilitated.

In balancing the various factors in the respondent's case, we take note of his substantial favorable equities, especially the possibility that his removal will result in hardship to his young daughter. However, when we weigh these equities against the adverse factors of his extensive history of engaging in criminal conduct, including conduct that posed a substantial danger to others, it is our judgment that a favorable exercise of discretion is not warranted absent strong evidence that the respondent has no propensity to reoffend. The fact that the respondent has continued to engage in drug crimes for more than 25 years despite having faced repeated and significant penal consequences frankly leaves us with little confidence that he will be more successful in the future. We are sensitive to the respondent's evident drug problem and we sympathize with his family members who will undoubtedly experience hardship

in connection with his removal. Our ultimate duty, however, is to safeguard the interests of the United States, and not just the interests of the respondent or those close to him. In consideration of this duty, we must conclude that a favorable exercise of discretion would not be in the best interest of the United States in this instance. Accordingly, the following orders shall be issued.

ORDER: The DHS' appeal is sustained, the Immigration Judge's decision is vacated in part and the respondent's application for cancellation of removal is denied in the exercise of discretion.

FURTHER ORDER: The respondent is ordered removed to Jamaica.

Roger D. Pauly
For The Board

Board Member Patricia A. Cole respectfully dissents. I would affirm the Immigration Judge's finding that the respondent merited a favorable exercise of discretion to be granted cancellation of removal. The Immigration Judge was obviously cognizant of the respondent's negative equities, and discussed the respondent's various criminal convictions. He found that all of the respondent's convictions except one were misdemeanors, including the most recent misdemeanor conviction for reckless endangerment. However, the Immigration Judge found that in spite of those negative equities, the respondent's positive factors outweighed the negative factors and on balance concluded that the respondent warranted relief. The

Immigration Judge recognized that this was a close case, and his decision recognizes that there are intricacies inherent in the respondent's claim, worthy of affording the respondent the requested relief. I find no error in the Immigration Judge's decision below, and would affirm the grant of relief.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

File No.: A 18 694 969
July 31, 2007

In the Matter Of	)
	)
PAUL JOSEPH MCNEIL	)
a/k/a/ PABLO MCNEIL	)
Respondent	)

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(B)(i) and Section 237(a)(2)(C)

APPLICATIONS: Cancellation of Removal-permanent resident.

ON BEHALF OF RESPONDENT:
Rami Fakhoury, Esquire

ON BEHALF OF DHS:
Maureen Gaffney
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 49-year old married, but separated male alien, native and citizen of Jamaica,

admitted as a permanent resident in 1970. He was placed into removal proceedings by issuance of a Notice to Appear, Form I-862, dated March 21, 2007. In prior proceedings, respondent conceded to the allegations therein. There are two I-261's in this matter, additional grounds of removal. First, dated April 17, 2007. The second, dated July 11, 2007. The respondent appeared in court today with counsel of record to pursue his application for cancellation of removal as a permanent resident in accordance with INA section 240A(a).

The respondent's testimony in this case is taken essentially as credible. The respondent appeared eager to answer the questions asked of him for the most part. He answered them as directly as he was able to do. He presents as a 49-year old married but separated male. He has three United States citizen children. The oldest two are adults. The youngest child, Datwana, is 12 years old and the respondent is her Court-ordered custodial parent. By all accounts, their relationship is a close one as he has testified and as the respondent's mother corroborated.

By all accounts, the respondent has been a lawful permanent resident for the past 37 years. His employment history has been on again, off again. Mostly working for the City of New York in the parks department on a seasonal basis. When not working, respondent receives public assistance, primarily in the form of food stamps and subsidized housing. What brings him before the Court is his criminal record

spanning from the early 1980's to 2007 with a total of 11 convictions, all misdemeanors except for a 1990 criminal sale of marijuana in the fourth degree. Under applicable 3rd Circuit precedent, this conviction does not constitute an aggravated felony drug trafficking conviction.

Respondent admits to having a past marijuana problem arising out of his Jamaican religious beliefs of the distant past. He contends that he successfully participated in Court-directed drug rehabilitation courses in the early 1990's and has been drug-free since then. He further contends that he pleaded guilty to the latest drug offense earlier this year just to get out of pretrial confinement but that he never had any drugs on him at the time he was arrested.

Now, by all accounts, respondent's primary focus is his young daughter, Datwana, who has been diagnosed with certain psychological orders including major depressive disorder, adjustment disorders, and other related maladies. According to respondent, the genesis of his daughter's disorder arose from being born to her crack addicted mother. Because the child's mother proved to be without maternal cares, respondent was awarded his child's sole custody early on and has cared for her ever since.

Respondent testified he plans to find a full-time job, return to the care of his daughter, and remain law abiding. As for his daughter, at present, she is in the care of her 70-year-old grandmother and 95-year- old

great grand mother. If deported, the respondent indicated he would like to take his daughter with him to Jamaica but respondent's mother has indicated that would be unlikely since her son has no means of support there and left when he was about 11 years old.

The Court has applied the standards for cancellation of removal as set forth by the Board in Matter of C-V-T- , 22 I&N Dec. 7 (BIA 1998), where the Board stated that the general standards developed in prior case law for the exercise of discretion under former section 212(c) are applicable to the exercise of discretion under cancellation of removal. See also Matter of Sotelo, 23 I&N Dec. 201 (BIA 201).

This case presents one which the Court sees as closer than does the Government counsel, at least from the daughter's perspective. Respondent certainly has not been attentive as one would expect him to be with a child who experiences mental health maladies. He became entangled with a girlfriend which resulted in two different arrests in 2006 for misdemeanor criminal mischief and disorderly conduct. He also became angered at a perceived slight by his family last year and inadvertently struck a car with a beer bottle, resulting in a misdemeanor conviction for reckless endangerment.

Now, it is abundantly clear that respondent cares deeply for his daughter, Datwana, and of course, for his mother and the rest of his family. All in all,

respondent is not a bad person. As his attorney points out, he went some 18 years or so between convictions up until 2006. Accepting public assistance is not a negative factor. And by all accounts, when he is working, he is a good and reliable worker.

For all that, the Court concurs with DHS counsel that respondent is not strictly an "asset" to the United States if one defines that term as fully law abiding and fully employed. On the other hand, being a loving, caring and concerned parent to a troubled young pre-teen and having a keen interest in her welfare certainly shows this individual to not be without redeeming qualities. Thus, the need for weighing the positive equities against the negative factors which the Board stresses is crucial in these cases.

This case to the Court represents a close one. To be quite frank, this Court grants a rather high percentage of cancellation cases but certainly not all. Especially when young and vulnerable children are at stake, the Court endeavors to maintain family unity as in the best interests of the children whenever possible. It does so in this case. Given respondent's criminal record, the Court would be justified in denying his claim and would do so absent the child factor. Here, Datwana is not only a preteen, she is his only child living at home, now with elderly grandparents. She is an exceptional needs child, apparently. The psychological assessment in the record establishes the great need that she has of her father's presence in her

life and the further and enhanced difficulties she faces without him.

After taking the case fully under advisement, the Court will act favorably on respondent's application for discretionary relief, primarily because of his young daughter's benefit. She is the victim in this case and should not be punished for something over which she has no control. Removing this respondent at this time just would not serve this country any good. It may well likely cause irreparable harm to a vulnerable child. On the other hand, respondent has only himself to blame for the predicament. He needs to get his act together and remain law abiding and gainfully employed. By this order, the Court is giving him this one last opportunity. The following orders are hereby entered.

ORDER

Respondent's application for cancellation of removal in accordance with Section 240A(a) is hereby granted in the exercise of discretion.

Walter A. Durling
Immigration Judge